



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-CON-2017/01666

In the matter between:

AUSTIN JOHN LUCKHOFF

PLAINTIFF

and

**NICO'S GENERAL INVESTMENT CC
NATIONAL HOUSING ENTERPRISE**

**FIRST DEFENDANT
SECOND DEFENDANT**

Neutral citation: *Luckhoff v Nico's General Investment CC* (HC-MD-CIV-CON-2017/01666) [2019] NAHCMD 273 (6 August 2019)

Coram: PARKER AJ

Heard: 16, 30 October; 6, 8, 27, 28 November; 3 December 2018; 22 January; 26, 27 March; 4 April; 20 May; 10, 18, 23 July 2019

Delivered: 6 August 2016

Flynote: Contract – Plaintiff and first defendant concluding partnership agreement – Second defendant consented to agreement by signing it – Second defendant thereby accepted its obligation under the agreement – Court held that a good cause of action can be founded on a promise made seriously and deliberately and with intention that a lawful obligation should be established – Court held further that there is nothing inherently objectionable about two persons, by their contract, imposing an obligation on a third person, with that third person's consent, as is in the present matter – Court found that by breaching its obligation under the agreement second defendant repudiated the agreement – Court further held that the test for repudiation is whether promisor acted in such a way as to lead a reasonable person to the conclusion that he or she did not intend to fulfil his or her part of the contract – Court found that there was no evidence before the court that partnership agreement has been cancelled – Consequently, court accepted plaintiff's averment that plaintiff has not accepted second defendant's repudiation of the agreement and holds defendants to that agreement – Consequently, court finding that plaintiff has made out a case for specific performance.

Summary: Contract – Plaintiff and first defendant concluding partnership agreement – Second defendant consented to agreement by signing it – Second defendant thereby accepted its obligation under the agreement – Court held that a good cause of action can be founded on a promise made seriously and deliberately and with intention that a lawful obligation should be established – Court held further that there is nothing inherently objectionable about two persons, by their contract, imposing an obligation on a third person, with that third person's consent, as is in the present matter – Court found that by breaching its obligation under the agreement second defendant repudiated the agreement – Under the construction agreement between employer (second defendant) and employee (first defendant) the latter was to construct three houses – Second defendant accepted partnership agreement between plaintiff and first defendant – Plaintiff to supply labour and equipment for project and first defendant to supervise construction works – Thereafter second defendant not only approved the partnership agreement but also consented to clause 5 thereof in particular whereby second defendant was to make payment of funds to plaintiff through trust account of plaintiff's legal practitioners – Second defendants made partial payment to such trust account but decided to make

remainder of payments direct to first defendant under the unproven assumption that the partnership agreement has been cancelled – Court found that second defendant’s assumption was not established by the evidence – Accordingly, court found that partnership agreement had not been cancelled – Consequently, court found second defendant’s conduct to amount to repudiation of the partnership agreement – Plaintiff did not accept the repudiation and continued to hold defendants to the partnership agreement – On the evidence, court found that plaintiff has made out a case for specific performance – Consequently judgment granted to the plaintiff for payment of amounts due to plaintiff which second defendant had paid directly to first defendant in breach of second defendant’s obligation under the partnership agreement.

ORDER

(a) Judgment for the plaintiff in the amount of N\$297 326.75, plus interest on the amount of N\$279 326.75 at the rate of 20 per cent per annum, calculated from 17 May 2017 until date of full and final payment.

(b) Second defendant must pay plaintiff’s costs, including costs of one instructing counsel and one instructed counsel.

JUDGMENT

PARKER AJ:

(a) Introduction

[1] Plaintiff instituted action proceedings against first defendant and second defendant, a parastatal organization, and claims against first defendant and alternatively, second defendant as follows: (a) payment of N\$750 700, and interest on the amount at the rate of of 20 per cent per annum a *tempore morae*, and (b)

costs of suit. I should say that the issues that are the essence of the matter and that divide the parties turn on a very short and a very narrow compass.

[2] Plaintiff testified on his own behalf, and did not call any other witnesses. Mr Theron, who describes himself as the Site Agent for second defendant in respect of Project 180151, the subject matter of this matter, is the only witness called on behalf of second defendant.

[3] Second defendant awarded to first defendant a tender under Project Code 180151 for the construction of three houses for the Ministry of Veteran Affairs in the Omaheke Region. Thereafter, first defendant and plaintiff concluded a partnership agreement on 22 July 2016, that is, four days thereafter, on 26 July 2016. Second defendant 'accepted' the partnership agreement. It is important to note at the outset that first defendant has not defended the action. First defendant – in person or by counsel – has not taken part in these proceedings. It is not the burden of this court nor is it open to Mr Kwala, who is not first defendant's counsel but second defendant's counsel, to hold brief for first defendant and speculate about first defendant's reasons for not defending the action. This is a free society, and first defendant is entitled to do that.

[4] For the sake of clarity and because the bone and marrow of second defendant's plea is the interpretation and application of the partnership agreement, I append below the entire partnership agreement. And as respects the partnership agreement, I wish to say the following without beating about the bush: I shall not, with respect, waste my time to consider the 'law on partnership agreement' and 'partnership agreement requirements' that form a part of Mr Kwala's submission. It is labour lost. Whether the partnership agreement meets the requirements of partnership agreement is not pleaded. It has never been the case of second defendant. In that regard, it must be remembered, counsel's submissions are not pleadings; neither are they evidence. In sum, they are irrelevant in these proceedings. What is relevant is, as I have said previously, second defendant accepted the partnership agreement as signified by the signature of the 'Duly authorized thereto and acting for and on behalf of National Housing Authority' (second defendant), appearing at the end the partnership agreement.

[5] Here is the partnership agreement:

PARTNERSHIP AGREEMENT

MEMORANDUM OF PARTNERSHIP AGREEMENT ENTERED INTO AND BETWEEN:

NIKODEMUS SEBLON

Duly authorized thereto and acting for and on behalf of

NICO'S GENERAL INVESTMENTS CC

REGISTRATION NUMBER CC/2005/1790

OF P. O BOX 95209

WINDHOEK

(hereinafter referred to as Partner "A")

and

AUSTIN JOHN LUCKHOFF

IDENTITY NUMBER 530207 0034 5

OF P. O BOX 682

GOBABIS

(hereinafter referred to as Partner "B")

WHEREAS (party) parties "A" has been awarded a construction tender by National Housing Enterprise under Project Code No. 180 151 for the construction of three houses for the Veterans Ministry in the Omaheke Region;

AND WHEREAS the above parties are desirous of entering into a partnership and joint venture for the construction of the said three houses;

AND WHEREAS the parties hereto are desirous of recording the various terms and conditions of the said partnership;

NOW THEREFORE, THE PARTIES HERETO AGREE AS FOLLOWS:

1.

The parties hereto agree to do business in partnership from 1 August 2016.

2.

The business will be conducted under the name and style of **NICO'S GENERAL INVESTMENTS CC, REGISTRATION NUMBER 11/2005/1790.**

3.

This Partnership will continue until completion of the contract with NHE.

4.

Partner "A" will be responsible for supervision over the project.

Partner "B" will furnish surety-ship in the amount of N\$159 620.00 (One hundred and Fifty Nine Thousand Six Hundred and Twenty Namibia Dollars).

Partner "B" will further be responsible to supply all materials and labour on the construction (sites) sides until completion of the project.

5.

The Parties agreed that all funds will be paid into the Trust Banking Account of Kempen-Maske Legal Practitioners at First National Bank, Account Number 55310312835, Branch Code 280372 from which account the project will be financed.

6.

After completion of the project Partner "A" will receive N\$160 000.00 as remuneration.

Partner "B" will receive the balance of any remaining funds.

7.

This Agreement constitutes the whole of the agreement between the parties hereto relating to the subject matter hereof and save as otherwise provided herein no amendment, alteration or variation shall be of any force or effect unless reduced to writing and signed by all or on behalf of all parties.

8.

No relaxation, indulgence or leniency which is permitted or concession which is made at any time to a Partner in respect of the discharge of his duties in terms of the provisions of this Agreement, must be interpreted as a waiver or an abandonment of the rights of the other (partner) Partners in terms of this Agreement, or prejudice their rights in any way.

9.

The parties hereto consent to the jurisdiction of the magistrate's court in respect of any action or dispute which may arise out of this Agreement.

10.

The parties hereto choose as their respective *domicilium citandi et executandi* the addresses as set out in the introduction to this Agreement.

THUS DONE AND SIGNED AT GOBABIS THIS 22ND DAY OF JULY 2016

AS WITNESSES:

- | | | |
|----|-------------|----------------------------|
| 1. | [Signature] | [Signature]
PARTNER "A" |
| 2. | [Signature] | [Signature]
PARTNER "B" |

ACCEPTED BY NATIONAL HOUSING ENTERPRISE ON THIS 26 DAY OF JULY 2016

AS WITNESSES:

- | | | |
|----|-------------|---|
| 1. | [Signature] | [Signature]
Duly authorized thereto and |
| 2. | [Signature] | Acting for and on behalf of
National Housing Enterprise' |

[6] According to the pleading, plaintiff sues on a written contract, that is, the partnership agreement; and in terms of rule 45 (7) of the rules of court, he has annexed the partnership agreement to the pleadings. He has set out the breach complained of, and claims specific performance on the part of second defendant. As I see it, and as Mr Mouton, counsel for plaintiff, submitted, *pace* Mr Kwala, the present action is not founded on delict. Plaintiff does not allege the commission of a tort.

[7] The mainstay of second defendant's defence is encapsulated in para 3.3 of its amended plea to the particulars of claim:

'3.3 The Second Defendant takes note of annexure "A" (the Partnership Agreement) attached to the Plaintiff's particulars of claim which the Plaintiff alleges was entered into between "the parties" but pleads that the Second Defendant was not a party to the Partnership Agreement as it was concluded between Plaintiff and First Defendant **only**.'

(b) Is the partnership agreement valid and enforceable against second defendant?

[8] Mr Kwala takes the aforementioned plea in refrain in his submission thus: 'It is the Second Defendant's case that there was no legal relationship between the Second Defendant and Plaintiff and as such there was no breach of contract. The Second Defendant's premise in support of these averments is as follows – in order for one to succeed with a claim of breach of contract – there should first be established that there was a valid contract between the Plaintiff and the Second Defendant.' It follows unmistakably that the talisman on which second defendant hangs his case is simply that the partnership agreement does not bind second defendant. If I find that it does, second defendant has no defence, as a matter of course, and accordingly, plaintiff would be entitled to judgment. I now proceed to demonstrate that like all talismans, second defendant's talisman is illusory.

[9] In support of second defendant's case, Mr Kwala relies with great verve on this court's judgment in *DG v TG* (HC–MD–ACT–MAT–2017/00720) [2017] NAHCMD 308 (10 October 2017) where Prinsloo J stated:

'A contract is a lawful agreement, made by two or more persons within the limits of their contractual capacity, with the serious intention of creating a legal obligation communicating such intention without vagueness, each to the other and being of the same mind as to the subject matter to perform positive or negative acts which are possible of performance.'

[10] Counsel relies also on Van Der Merwe, *et al* (2004), *Contract – General Principles*, 2 ed (2004) at 8, where the learned author define a contract as: '[A]n agreement which actually creates legal obligations'. And he explains further that –

'One must assume that an agreement will be a contract only if the parties intend to create an obligation or obligations, and if, in addition, the agreement complies with all other requirements which the law sets for the creation of obligations by agreement such as the contractual capacity of the parties, possibility of performance, legality of the agreement, and prescribed formalities.'

[11] What Prinsloo J and Van der Merwe state are good law, no doubt. But what they state are general principles which, like all general principles, cannot apply unqualified and immutably in all cases as if they are provisions of a statute. The application of general principles should take into account the facts and circumstances of the case at play.

[12] The relevant facts of this case respecting the partnership agreement, which is in issue, and that are undisputed or indisputable are what I have set out previously.

[13] On the facts and in the circumstances of this case, I make the following analysis and conclusions thereanent. In our law any serious and deliberate agreement made with the intention that a lawful obligation should be established is enforceable. (RH Christie *The Law of Contract in South Africa*, 3 ed (1996) at 119). That is also Prinsloo J's view (see para 9). As a general principle of law, bar statutory imposition, an agreement does not need to conform to any specific formality to make such agreement enforceable. Examples of such statutory imposition, which do not apply in the instant matter concern: alienation of land (see Act 68 of 1981); executory donations (see Act 50 of 1956); contracts of suretyship (see Act 50 of 1956); credit agreement (see Act 75 of 1980); and mining leases (see Act 16 of 1967) (Christie, *ibid*, at 119–143, *passim*) A good cause of action can be founded on a promise made seriously and deliberately and with the intention that a lawful obligation should be established (*Conradie v Rossouw* 1919 AD 279 at 324). That is also Prinsloo J's view (see para 9).

[14] Furthermore, there is the possibility that – considering the facts and circumstances – a valid contract may come into being without identifiable offer and acceptance (see *Christie*, *ibid*, at 24). It is, therefore, of no moment that second defendant did not take part in the negotiations leading up to the conclusion of the partnership agreement. What is relevant and, therefore, significant in this matter is that second defendant not only accepted and assented to the partnership agreement, but also, with the intention to be bound by its obligation under the agreement, made payment in respect of the project into the trust account of Kempen-Maske Legal Practitioners at First National Bank, account number 553101312835, branch code 280 372, in terms of second defendant's obligation under clause 5 of the partnership agreement. If second defendant was not bound by the partnership agreement on the basis – as it avers – that it is not a party to the agreement, why would the second defendant be bothered whether the partnership agreement is cancelled by first defendant? Why would the alleged cancellation concern second defendant, to ask rhetorically.

[15] It follows that contrary to Mr Kwala's persistent statement that there was no meeting of minds, I should say that there was a meeting of minds, ie *consensus ad idem*, when second defendant accepted and assented to the partnership agreement: and what is more, when it proceeded to perform its obligation under that agreement as aforesaid. It should be remembered, a contract may come into existence by the consent of a person to an agreement, as second defendant did in the manner described previously.

[16] Mr Kwala is so much enamoured with plaintiff's answer in cross-examination where plaintiff answered that the parties are the plaintiff and Nico (first defendant). Plaintiff's answer must be understood in context. Plaintiff was referred to the names of the contractors appearing at the beginning of the 'Partnership Agreement'. Any reasonable and fair-minded person to whom the beginning of the partnership agreement is referred will willy-nilly answer that the parties thereto are 'Nikodemus Seblon (for Nico's General Investments CC' (first defendant)) and 'Austin John Luckoff' (plaintiff). But, with the greatest deference to Mr Kwala, in order to suit his self-serving purpose, Mr Kwala did not refer the plaintiff to the end of the 'partnership agreement' where second respondent, through its 'Duly authorized hereto and acting

for and on behalf of National Housing Enterprise' (second defendant)', accepted unambiguously and unmistakably the partnership agreement and its obligation under that agreement.

[17] There is nothing inherently objectionable about two persons, by their contract, imposing an obligation on a third person with that third person's consent, as is in the present matter. Such contractual arrangement qualifies the principle of privity of contract. See Dale Hutchison (Ed) and Chis-James Pretorius (Ed) *The Law of Contract in South Africa* 2 ed (2012) at 223.

[18] In any case, where the existence of a contract and any connected matters, eg the identity of the contractors, are in issue in proceedings, such issues are questions of mixed fact and law. The question of law component must be resolved by reference to legal principles, and the question of fact component ought to be resolved by evidence. It follows that Mr Luckoff's answer alone which is a fact cannot resolve the issue. I have demonstrated previously that as a matter of law the partnership agreement is valid and enforceable. I now proceed to determine whether it binds, and is enforceable against, second defendant.

[19] In deciding whether the partnership agreement is enforceable against second defendant, I will proceed in this way: I have judged the external manifestations, ie the second defendant unmistakably assenting to the partnership agreement barely two days after it was concluded by plaintiff and first defendant, and second defendant proceeding to perform its obligation under the agreement in a manner mentioned previously. Moreover, it should be remembered that in our law, 'An acceptance may be inferred from conduct'. (*Goldblatt v Fremantle* 1920 AD 123 at 128). The result is that I have no difficulty – none at all – in deciding that the partnership agreement is a valid agreement and enforceable against second defendant.

[20] If the truth be told, Mr Kwala's unyielding persistence that the partnership agreement does not bind second defendant is debunked by second defendant's own amended plea. Second defendant pleads:

'4.1.4 It was against the forgoing background that the Second Defendant accepted the Partnership Agreement, in particular clause 5 thereof. *For all intent and purposes the*

Second Defendant's only obligation was to pay the money into the trust account of Kempen Maske Legal Practitioners. The remainder of the terms were binding on Plaintiff and First Defendant only.'

(Italicized for emphasis)

[21] And clause 5 provides:

'The Parties agreed that all funds will be paid into the Trust Banking Account of Kempen-Maske Legal Practitioners at First National Bank, Account Number 55310312835, Branch Code 280372 from which account the project will be financed.'

[22] In my view, with respect, Mr Kwala's argument is fallacious and self-serving. It cannot assist second defendant's case: It does not take second defendant's case any further than where it is, namely, that second defendant is not acting in good faith, if at this late hour it seeks to denounce its unequivocal acceptance of the partnership agreement as binding on it, and *'in particular clause 5 thereof'*, especially when, as I have said more than once, second defendant performed – partially though – its obligation contained in the aforementioned clause 5 of the partnership agreement. The emphasized words are taken straight from second defendant's own amended plea.

[23] In his submission, Mr Kwala sought to insinuate that second defendant's consent to the partnership agreement was obtained by fraud on the part of plaintiff and first defendant and/or by they falsely representing to second defendant about the nature and extent of second defendant's obligation under the partnership agreement. With respect, I roundly reject Mr Kwala's submission. The defence of *exceptio doli specialis* is not open to second defendant for the simple reason that second defendant has never pleaded such defence and no evidence was led by second defendant to establish such defence. Mr Mouton countered Mr Kwala's submission along similar lines.

[24] In sum, second defendant's conduct amounts to a repudiation of the partnership agreement, as second defendant did act in a way as to lead a reasonable person to the conclusion that second defendant did not intend to fulfil its

obligation under the partnership agreement. (See *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (I) SA 645 (A).)

(c) Is the partnership agreement cancelled?

[25] At the outset, I wish to go back to the basics. Cancellation is intended to terminate the primary obligations of the contract there and then but not retrospectively. (Christie, *ibid*, at 596). To that end, a notice of cancellation must be clear and unequivocal (*Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A) at 380E). Notice takes effect from the time it is communicated to the other party. (*Swart v Vosloo* 1965 (I) SA 100 (A) at 105G) If it has not been communicated, notice takes effect from service of summons or notice of motion. (*Du Plessis v Government of the Republic of Namibia* 1994 NR 227 (HC))

[26] In the instant proceedings, I find, and it is undisputed, that second defendant has not alleged and proved that it cancelled the partnership agreement. Second defendant rehearses what first defendant told it that first defendant had cancelled the partnership agreement. But first defendant has not alleged and proved that it cancelled the partnership agreement. All that second defendant placed before the court is that which first defendant informed second defendant about, namely, that the partnership agreement has been cancelled. But that carries no weight. None at all, particularly when plaintiff put in issue in his particulars of claim whether the cancellation was lawful. Plaintiff avers that 'First Defendant has without just cause and/or reason, repudiated the Partnership Agreement between the parties in that it on or about 14 February 2017 *attempted* to cancel the Partnership Agreement when it caused a letter of "Notice of Resiliation and Cancellation of Partnership Agreement" to be forwarded to the Plaintiff at a time when the construction contract was/is not yet completed'. (Italicized for emphasis) First defendant, who is credited with cancellation of the partnership agreement, has not taken part in these proceedings. First defendant has not answered plaintiff's averment. First defendant has not given evidence which could have been tested in cross-examination about the cancellation of the partnership agreement.

[27] Thus, we have only second defendant's parroting what, it says, first defendant told it. Such evidence is irrelevant: It has no probative value. It counts for nothing. As the Greek Philosopher Parmenides is said to have argued, *ex nihilo nihil fit*. What second defendant tells the court is hearsay evidence through and through. I am surprised that such text book example of hearsay evidence is relied on by second defendant in these proceedings. Such evidence is inadmissible hearsay evidence. It is irrelevant. It matters not that the letter of cancellation is filed of record. But, as I have said previously, plaintiff has put in issue the lawfulness and validity of the 'attempt' first defendant made to cancel the partnership agreement.

[28] We should not lose sight of the evidence that second defendant requested plaintiff to confirm what first defendant had informed second defendant that the partnership agreement had been cancelled. Up to the date summons was served and beyond – up to the end of the trial – second defendant had received no such confirmation from plaintiff. Upon what legal basis then did second defendant assume that what second defendant had informed it was the truth, and therefore, capable of carrying consequences in law. I find that there is no legal basis for such assumption capable of engendering legal consequences, as Mr Mouton submitted, second defendant received no confirmation from plaintiff.

[29] It follows inexorably that plaintiff's averment in the pleadings that the partnership agreement is not lawfully cancelled stands unchallenged at the close of plaintiff's case. The conclusion is, therefore, inescapable that, as Mr Mouton submitted, the partnership agreement has not lawfully been cancelled. Consequently, I accept plaintiff's averment that plaintiff has not accepted repudiation of the partnership agreement and continues to hold the defendants to the partnership agreement.

(d) Did plaintiff carry out its obligation under the partnership agreement?

[30] I accept plaintiff's evidence that plaintiff, for all intents and purposes, carried out his obligation under the partnership agreement. On the facts, as Mr Mouton submitted, plaintiff duly supplied all the materials and labour in respect of the construction of the first two houses. An amount of N\$159 620 was deducted from

monies that should have been paid to him through Kempen–Maske Legal Practitioners. On that score, I accept plaintiff's version that he paid the suretyship amount because, as Mr Mouton argued, the deduction was made to defray the suretyship amount. With respect, Mr Kwala's submission that there is no evidence that plaintiff paid the suretyship amount is therefore not supported by all the evidence placed before the court thereanent. That second defendant deducted the amount to cover the suretyship amount from monies due to plaintiff is not disputed. There is, therefore, no real challenge to plaintiff's straight forward evidence that he paid the suretyship amount. It follows that plaintiff's pleading and evidence on the issue stand unchallenged at the close of plaintiff's case. How he paid the amount matters tuppence. I hold that on the facts plaintiff's obligation under the partnership agreement respecting the payment of the suretyship amount was carried out. I accept Mr Mouton's submission on the point.

(e) Conclusion

[31] It follows reasonably and inevitably that as a matter of course, second defendant had no good reason in law to act contrary to its aforementioned obligation under the partnership agreement. Moreover, second defendant did not act in good faith; but it has been recognized that good faith is applicable to all contracts. (*Tuckers Land and Development Corp (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) at 651C – 652G; *Mutual and Federal Insurance Co Ltd v Ondtshoorn Municipality* 1985 (I) SA 419 (A) at 433B) Furthermore, of the view I have taken about the partnership agreement, I do not find it necessary to consider Mr Mouton's argument on novation of the construction agreement by the partnership agreement.

[32] Based on all these reasons, I hold that a case has been made out for an order of specific performance, which Mr Mouton submitted, is all that plaintiff prays for in these proceedings. In granting an order for specific performance, the following pieces of evidence, which I accept, and parts of the pleadings are relevant. I also take into consideration the amendment to the plaintiff's prayer which Mr Mouton applied for from the Bar during his submissions. Mr Kwala did not object to the amendment, and I accept the amendment because the evidence accounts for the amendment.

[33] Plaintiff prays for judgment in the amount of.

- (a) N\$572 700, being the balance outstanding in respect of the third house.
- (b) N\$174 506.75, being the outstanding balance due in respect of completion of the first two houses.
- (c) N\$122 820, being retention monies deducted as evidenced by the Progress Payment Certificates.

[34] As to para 33 (a); Mr Mouton argued that this amount would have been paid to plaintiff but for the unlawful cancellation of the partnership agreement by first defendant and second defendant's unproven cancellation of the partnership agreement, as I have found previously. It is noted that plaintiff did not complete the third house. It is also not established that he supplied labour and materials towards the construction of the third house. Plaintiff has not established he went ahead to employ employees for the job and purchased materials meant for the project and his creditors are after him. For these reasons, I disincline to grant the entire relief sought in para 1 of the plaintiff's prayers. In sum, it will be unsafe and unsatisfactory to order second defendant to pay N\$572 700 claimed by defendant.

[35] As to para 33 (b) and (c), I hold that plaintiff has proved his case and so it is entitled to the amounts of N\$174 506.75 and N\$122 820.

Costs

[36] As respects costs, I think the general principle that costs follow the event must be applied. In the instant proceedings, it has not been shown that special circumstances exist to depart from the general rule. Plaintiff came to court seeking specific performance and it has succeeded. And so, it has achieved substantial success. The fact that plaintiff did not get the entire amount claimed is immaterial. If he had not approached the seat of judgment of the court and fought his case, plaintiff would have received nothing. Plaintiff has succeeded in establishing a substantial right. (Louis De Villiers van Winsen et al *Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa* 4 ed (1997) at 706; and the cases

there cited) In *Fleming v Johnson & Richardson* 1903 TS 319 at 325, Innes CJ said: 'It is a sound rule that where a plaintiff is compelled to come to Court,⁶ and recovers a substantial sum which he would not have recovered had he not come to Court, then he should be awarded his costs.'

[37] In the result, I make the following order:

- (a) Judgment for the plaintiff in the amount of N\$297 326.75, plus interest on the amount of N\$279 326.75 at the rate of 20 per cent per annum, calculated from 17 May 2017 until date of full and final payment.
- (b) Second defendant must pay plaintiff's costs, including costs of one instructing counsel and one instructed counsel.

C PARKER
Acting Judge

APPEARANCES:

PLAINTIFF: C J MOUTON
Instructed by Dr Weder, Kauta & Hoveka Inc, Windhoek

SECOND DEFENDANT: F KWALA
Of Kwala & Co.Inc., Windhoek